Petition

NO. 81-241

Supreme Court, U.S.
FILED
JUL 6 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

WARD LUMBER COMPANY, a corporation,
Petitioner,

v.

JOHN C. BROOKS, Commissioner of Labor
of the State of North Carolina,
Respondent.

On Writ of Certiorari to the Supreme Court of North Carolina

PETITION FOR WRIT OF CERTIORARI

HUGH JOSEPH BEARD, JR.
Counsel for Petitioner
2141 P Street, N.W., Apt. 602
Washington, D. C. 20037
Telephone: (202) 466-2528

THOMAS J. ASHCRAFT
Of Counsel for Petitioner
Horack, Talley, Pharr & Lowndes, P.A.
1250 City National Center
Charlotte, N. C. 28202
Telephone: (704) 377-2500

TENNESSEE LAW PRINTERS, P. O. Box 277, Knoxville, Tennessee. Phone 525-4202

7-1-81-50

QUESTION PRESENTED

Whether a state court may apply a standard of law to a motion for attorney's fees under 42 U.S.C. 1988 different from the standard applied in federal courts.

PARTIES

The names of the present parties to this civil action are contained in the caption. The Petitioner, Ward Lumber Company, has no parent, subsidiary, or affiliate corporations. Parties to this action who were dismissed by a previous decision of the Court of Appeals of North Carolina and whose dismissal is not sought to be reviewed here are John Alexander Gooden; Cornelius Butler, Jr., doing business as C. Butler, Jr. Lumber Company; William G. McDaniel, doing business as Shannon Wood Products; Lynwood N. Bullock, doing business as Lyn's Coach Works; M. M. Gilliland, doing business as Gilliland Logging Company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	i
TABLE OF AUTHORITIES	ii
REPORTED DECISIONS	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	4
ARGUMENT	9
CONCLUSION	18
APPENDIX	A-1

Table of Authorities

Cases

D. & W., Inc. v. Charlotte,
268 N.C. 577, 151 S.E.2d 199 (1966),
Supp. Op. 268 N.C. 720, 152 S.E.2d 199 (1966) 13

Dombrowski v. Pfister,
380 U.S. 241, 85 S.Ct. 1116,
14 L.Ed.2d 22 (1965) 9, 14, 15

Douglas v. City of Jeannette,
319 U.S. 157, 63 S.Ct. 877,
87 L.Ed.2d 1324 (1943) 15

Elmore v. Lanier,
270 N.C. 674, 155 S.E.2d 114 (1967) 13

Evans v. Fullard,
444 F.Supp. 1334 (W.D. Pa. 1978) 16

Ex parte Young,
209 U.S. 123, 28 S.Ct. 441,
52 L.Ed. 714 (1909) 9, 14

Gooden v. Brooks,
39 N.C. App. 519, 251 S.E.2d 698 (1979);
cert. granted, 297 N.C. 299, 254 S.E.2d
923 (1979); cert. denied, 298 N.C. 806,
261 S.E.2d 919 (1979); after remand,
___ N.C. App. ___, 273 S.E.2d 331 (1981);
cert. denied, ___ N.C. ___, ___ S.E.2d ___
(1981) 1
High Point Surplus Co. v. Pleasants,
263 N.C. 587, 139 S.E.2d 892 (1965) 14
Hosey v. Club Van Cortland,
299 F.Supp. 501 (S.D.N.Y. 1969) 16
Joiner v. City of Dallas,
380 F.Supp. 754 (E.D. Tex. 1974), aff'd 419
U.S. 1042, 95 S.Ct. 614, 42 L.Ed.2d 637 (1974) 16
Maine v. Thiboutot,
___ U.S. ___, 100 S.Ct. 2502, 65 L.Ed.2d ___
(1980) 10, 17
Orange Speedway, Inc. v. Clayton,
247 N.C. 528, 101 S.E.2d 406 (1958) 14
Railport v. Provident National Bank,
451 F.Supp. 522 (E.D. Pa. 1978) 16
Roller v. Allan,
245 N.C. 516, 96 S.E.2d 851 (1957) 14
Steffel v. Thompson,
415 U.S. 452, 94 S.Ct. 1209,
39 L.Ed.2d 505 (1974) 9, 14, 15, 17
Truax v. Raich,
239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915) . 14
Walker v. Charlotte,
262 N.C. 697, 138 S.E.2d 501 (1964) 14
Younger v. Harris,
401 U.S. 37, 91 S.Ct. 746,
27 L.Ed.2d 669 (1971) 16

Zwickler v. Koota,
389 U.S. 241, 88 S.Ct. 391,
19 L.Ed.2d 444 (1967) 9, 14, 15

Constitutional Provisions

Amendment IV to the Constitution of the United
States of America 2

Statutory Provisions

28 U.S.C. 1257(3) 2
42 U.S.C. 1983 . . . . . 2, 9
42 U.S.C. 1988 . . . . . 3, 9

N.C.G.S. 15-27.2 4
N.C.G.S. 95-129(3) 5
N.C.G.S. 95-136(a) 5, 11, 12

Miscellaneous Other Authorities

7 Strong's North Carolina Index 3d,
Injunctions, 5.1 (1977) 13, 14

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

WARD LUMBER COMPANY, a corporation,
Petitioner,

v.

JOHN C. BROOKS, Commissioner of Labor
of the State of North Carolina,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

REPORTED DECISIONS

The first decision of the Wake County Superior Court is not reported and is set forth in the Appendix at Page A-1. The first decision of the Court of Appeals of North Carolina is reported at 39 N.C. App. 519, 251 S.E.2d 698 (1979) and is set forth in the Appendix at Page A-3. Discretionary review was granted by an order of the Supreme Court of North Carolina and reported at 297 N.C. 299, 254 S.E.2d

923 (1979) and is set forth in the Appendix at Page A-16, which decision was vacated and discretionary review denied by a subsequent order of the Supreme Court of North Carolina reported at 298 N.C. 806, 261 S.E.2d 919 (1979) and is set forth in the Appendix at Page A-18. The second decision of the Wake County Superior Court is not reported and is set forth in the Appendix at Page A-20. The second decision of the Court of Appeals of North Carolina, review of which is sought by this Petition, is reported at ___ N.C. App. ___, 273 S.E.2d 331 (1981) and is set forth in the Appendix at Page A-28. Discretionary review was denied by an order of the Supreme Court of North Carolina on April 17, 1981, which has not yet been reported and which is set forth in the Appendix at Page A-33.

JURISDICTION

Review is sought of the judgment of the Supreme Court of North Carolina dated April 17, 1981 under the authority of Section 1257(3) of Title 28 of the United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the Constitution of the United States of America provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

Section 1983 of Title 42 of the United States Code provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 1988 of Title 42 of the United States Code provides:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, insofar as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedy and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the parties found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, Title IX

of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

On May 9, 1977, Mr. James A. Wyatt, a Safety Officer employed by the North Carolina Department of Labor, OSHA Division, entered into the public portions of the place of business of Ward Lumber Company and announced his intentions to conduct an inspection pursuant to provisions of Chapter 136(a) of Chapter 95 of the North Carolina General Statutes. Mr. Wyatt did not at this time have a search warrant. Mr. J. Alexander Gooden, President of Ward Lumber Company and one of the original plaintiffs herein, refused him permission to enter the nonpublic portions of the place of business of Ward Lumber Company without a search warrant. Immediately thereafter, Mr. Wyatt secured a document purporting to be an Administrative Inspection Warrant issued pursuant to the provisions of N.C.G.S. 15-27.2. This document was presented to Mr. Gooden, as President of Ward Lumber Company, with a demand that Ward Lumber Company submit to the inspection pursuant to the warrant. Mr. Gooden declined to permit the inspection.

Thereafter on July 19, 1977, the Director of the OSHA Division of the North Carolina Department of Labor, acting under the direction of Respondent Brooks, issued a citation charging Ward Lumber Company with a violation of the North Carolina Occupational Safety and Health Act,

N.C.G.S. 95-129(3), alleging a "failure by employer to refrain from unreasonable restraint of a lawfully appointed agent of the Commissioner of Labor [Respondent Brooks] to inspect the employer's place of business, and a violation of N.C.G.S. 95-136(a)(1), by the failure by the owner, operator or agent in charge to allow the entrance of a duly authorized agent of the Commissioner of Labor [Respondent Brooks] upon presentation of appropriate credentials." A proposed penalty of $800 was then assessed against Ward Lumber Company for this violation. Pursuant to the provisions of the North Carolina Act, this citation was sufficient to impose a civil penalty upon Petitioner and docket judgment against it and its property unless Ward Lumber Company took affirmative action to contest the citation.

On July 28, 1977, Ward Lumber Company issued a statement contest in accordance with the statute, denying the material allegations of the citation and the jurisdiction of the OSHA office to issue such a citation. This was received by the OSHA Division on August 1, 1977. On August 9, 1977, Respondent issued a Complaint in OSHA-NC No. 77-215 seeking to have the North Carolina Safety and Health Review Board confirm the citation, order Petitioner Ward Lumber Company to comply with the provision of the OSHA Act which it allegedly violated, and order Ward Lumber Company to pay the penalty of $800.

On July 29, 1977, Petitioner Ward Lumber Company, together with several individual businessmen, including J. Alexander Gooden, President of Ward Lumber Company, brought suit before the Superior Court of Wake County, North Carolina, asking for declaratory and injunctive relief against Respondent John C. Brooks, specifically requesting the award of attorney's fees. The Complaint alleged that "the defendant has announced his intention,

and, the plaintiffs are informed and believe, intends to inspect, through his officers, agents and employees, and under the purported authority of the Occupational Safety and Health Act of North Carolina, Article XVI of Chapter 95 of the North Carolina General Statutes, the nonpublic portions of the property, places of business and work sites of the plaintiff, . . ., commencing on September 19, 1977, without a search warrant granted by a judicial authority upon a showing of probable cause." Petitioner Ward Lumber Company further alleged the citation and penalty against it and Petitioner's information and belief that Respondent Brooks would penalize any future refusal to permit the officers of Respondent to enter and to inspect the nonpublic portions of the property, place of business and work sites of Petitioner because of a lack of a warrant.

Thereafter, on January 25, 1978, Respondent Brooks moved to dismiss the citation and penalty resulting from the refusal of Petitioner Ward Lumber Company to allow the inspection. The Safety and Health Review Board granted Respondent's motion on April 12, 1978. The reason for this dismissal was explained in Defendant-Appellant's New Brief before the Supreme Court of North Carolina during the Fall Term of 1979:

> "Indeed, voluntary dismissal of the citation and notification of proposed penalties under the jurisdiction of the Review Board was undertaken in a deliberate attempt to avoid the kind of decision in that form rendered by the Court of Appeals in the case at bar."

Respondent, at the time he moved for dismissal, stated that the purpose for this action was to permit him to inspect the plant. Respondent has now also admitted that his prosecution of Petitioner Ward Lumber Company

finds no legal basis in statute, regulation, policy or Review Board ruling.

On December 7, 1977, Petitioner moved for leave to amend its Complaint, which amendment specifically stated that this action had been brought in part under the authority of Section 1983 of Title 42 of the United States Code, and reaffirmed the request of plaintiffs for declaratory and equitable relief, and for the award of attorney's fees. This amendment was allowed on December 12, 1977.

Immediately thereafter, also on December 12, 1977, the Superior Court dismissed the Complaint, as so amended, on the grounds that it failed to state a cause of action upon which relief could be granted, and, in the alternative, should the amended complaint state a cause of action, upon the grounds that there was no genuine issue as to any material fact and that Respondent Brooks was entitled to judgment as a matter of law. Petitioner appealed to the Court of Appeals, which on February 6, 1979, reversed the decision of the Superior Court as to Petitioner Ward Lumber Company. 39 N.C. App. 519, 251 S.E.2d 698 (1979).

The Court of Appeals held that Section 136(a) of Chapter 95 of the North Carolina General Statutes was in violation of the First and Fourteenth Amendments to the Constitution of the United States of America, and that its enforcement ought to be enjoined. 39 N.C. App. 523, 251 S.E.2d 701. The court further held that the document which Mr. Wyatt had presented purporting to be an Administrative Inspection Warrant was void inasmuch as it was not granted upon a showing of administrative probable cause as required by the Fourth Amendment to the Constitution of the United States. 39 N.C. App. 529, 25 S.E.2d 705.

On March 13, 1979, Respondent Brooks entered an appeal to the Supreme Court of North Carolina and filed a petition for discretionary review. Review was granted on May 1, 1979. 279 N.C. 299, 254 S.E.2d 923 (1979). Briefs were filed and oral argument made. The Supreme Court, on December 4, 1979, reconsidered the petition and determined that the order allowing discretionary review was improvidently granted and dismissed the proceedings. 298 N.C. 806, 261 S.E.2d 919 (1979).

Petitioner thereupon moved the Superior Court for summary judgment upon the basis of the opinion of the Court of Appeals and the pleadings, discovery and testimony theretofore entered in the civil action. A motion for fees in the amount of $27,446.23 was made simultaneously therewith.

On January 29, 1980, the Superior Court granted summary judgment for Petitioner, declared the provisions of Section 136(a) of Chapter 95 of the North Carolina General Statutes to be in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States insofar as it authorized warrantless inspections, and permanently enjoined Respondent Brooks from inspecting any nonpublic portions of the property of Petitioner Ward Lumber Company or anyone similarly situated without first obtaining the consent to conduct said search from a person or persons entitled to give the same or without obtaining a search warrant. The question of fees was retained on the docket of the Wake County Superior Court.

On March 13, 1980, the Superior Court denied Petitioner's motion for fees upon several alternative grounds, one of which was that the North Carolina Court of Appeals had not previously held that Petitioner had stated a claim for relief under Section 1983 of Title 42 of the United States

Code and did not consider or address such claim, and that Petitioner Ward Lumber Company had suffered no deprivation of its constitutional rights.

Upon these grounds the Court of Appeals affirmed the decision of the Superior Court. ___ N.C. App. ___, 273 S.E.2d 331 (1981). The Supreme Court of North Carolina denied petition for discretionary review filed by Ward Lumber Company on April 17, 1981. ___ N.C. ___, ___ S.E.2d ___ (1981).

ARGUMENT

The question presented here is whether the Supreme Court and Court of Appeals of North Carolina disregarded applicable federal law in holding that Petitioner Ward Lumber Company is ineligible for an award of attorney's fees under 42 U.S.C. 1988.

Petitioner submits that the court below ignored the clear holdings of this Court in *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); *Zwickler v. Koota*, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965); and *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1909).

By disregarding federal law, and denying Petitioner attorney's fees, the state courts applied a standard of law different from that under which Petitioner's motion for attorney's fees would have been considered in federal courts.

The law is now clear that if Petitioner had prevailed in a civil action brought in state court under the provisions of 42 U.S.C. 1983, it would be entitled to the award of attorney's fees pursuant to the provisions of

42 U.S.C. 1988. *Maine v. Thiboutot*, ___ U.S. ___, 100 S.Ct. 2502, 65 L.Ed.2d ___ (1980). Where a claim is based on both a state statute (which does not provide for the recovery of attorney's fees) and on 42 U.S.C. 1983, it is not necessary that the state trial court base its decision on Section 1983 in order for the prevailing party to be entitled to attorney's fees under 42 U.S.C. 1988. If the state trial court does not address the Section 1983 claim, but rather decides the case on the basis of the state statute, the test for determining whether the prevailing party is entitled to attorney's fees is twofold: (1) was there a substantial claim under Section 1983 and (2) was there a common nucleus of operative facts between the 1983 claim and the successful declaratory judgment claim under state law.

The Court of Appeals of North Carolina, after quoting Section 1983, stated:

> "The record discloses that although a citation and notification of proposed penalty were issued to plaintiff, plaintiff contested the citation and proposed penalty and subsequently the defendant voluntarily dismissed that portion of the administrative proceeding related to plaintiff's refusal to honor the administrative inspection warrant. In addition, the record discloses that plaintiff's place of business was not inspected during the pendency of this litigation. Plaintiff therefore was not deprived of any constitutional rights as a result of the issuance of the invalid warrant. Simply stated, plaintiff has failed to show any deprivation of rights as required in order to claim relief under 42 U.S.C. Sec. 1983. As plaintiff has failed to meet the first prong of the test

> referred to above, a substantial claim under 42 U.S.C. Sec. 1983, and thus is not entitled to recover its attorney's fees under 42 U.S.C. Sec. 1988, we will not address the issue of whether plaintiff has met the second prong of that test." (Opinion at 3-4).

The Court of Appeals holds that, under these facts, the citation and proposed penalty must have become final and the business must have been actually entered and inspected in order to deprive Petitioner of rights under the Fourth Amendment.

This test must be taken as a cumulative test or an alternative test. If these two elements are considered cumulative, that the property must have been inspected *and* that the prosecution must have been successful and the penalty final, the test would require a logical impossibility: Petitioner cannot be penalized for refusing to allow an inspection if the inspection has in fact taken place. The test therefore must be taken in the alternative: that if Petitioner's place of business had been in fact inspected *or* if the penalty had become final, Petitioner would have been deprived of its Fourth Amendment rights. The Court of Appeals of North Carolina found that neither of these two elements were met.

Once it is determined what the Court of Appeals meant to say in its opinion, it is next necessary to determine what it did not say.

The unconstitutionality of the statute was not subject to review. The Court of Appeals had previously determined that Section 136(a) of Chapter 95 was unconstitutional. 39 N.C. App. 523, 251 S.E.2d 701 (1979). The Superior Court, upon remand, had granted summary judgment upon

the basis that the statute was unconstitutional. Respondent Brooks had not appealed or made cross-assignments of error from the grant of summary judgment by the Superior Court. Under Rule 10(d) of the North Carolina Rules of Appellate Procedure, the validity of Section 136(a) was no longer in question.

Second, the propriety of the grant of declaratory relief was not subject to review. The Court of Appeals, the first time around, held plaintiff was entitled to a declaratory judgment that Section 136(a) was unconstitutional. 39 N.C. App. 523, 251 S.E.2d 701 (1979). The Supreme Court of North Carolina had denied discretionary review. The Supreme Court granted summary judgment entering a declaration that Section 136(a) was in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States. Respondent Brooks did not appeal or make cross-assignments of error with respect to this relief. Under the North Carolina Rules of Appellate Procedure, the appropriateness of the grant of declaratory judgment was not subject to review.

Third, and perhaps most important, the propriety of the issuance of an injunction against Respondent Brooks enjoining him from the further enforcement of Section 136(a) was not subject to review. The Court of Appeals held that Petitioner was entitled to have enforcement of Section 136(a) enjoined insofar as it permitted and authorized warrantless searches of the nonpublic portions of the place of business of Petitioner. 39 N.C. App. 523, 251 S.E.2d 701. As noted above, the Supreme Court of North Carolina denied discretionary review. The Superior Court granted the injunction. Respondent Brooks has not appealed or made cross-assignments of error with respect to this injunction. Under the North Carolina

Rules of Appellate Procedure, the appropriateness of the grant of an injunction against Respondent Brooks was not subject to review.

The ramifications of the matters not here subject to review, particularly the propriety of granting an injunction, are crucial.

Since an injunction was granted, the prerequisites under state law for an injunction against the enforcement of a statute must have been met. The North Carolina prerequisites are set forth in 7 Strong's North Carolina Index 3d, *Injunctions*, Section 5.1, and in the cases cited therein. Strong's was also cited by the Court of Appeals in the first appeal. 39 N.C. App. 522, 251 S.E.2d 701. Upon summary judgment, the Superior Court therefore necessarily found at least these prerequisites of North Carolina law, not only to have been alleged, but also to have been proven by Petitioner Ward Lumber Company.

The prerequisites under state law are clear:

> "In order to be entitled to enjoin proceedings under a statute, plaintiff must not only establist prima facie unconstitutionality or invalidity of the statute, but must also show that he will suffer irreparable harm unless the injunction should issue. Accordingly, a party has no standing to enjoin the enforcement of a statute or ordinance when he fails to show that his rights have been impinged or are *imminently threatened* by the operation of the legislation."
> 7 Strong's North Carolina Index 3d, *Injunctions*, Section 5.1 (1977). (Emphasis supplied).

Several cases support this proposition: *Elmore v. Lanier*, 270 N.C. 674, 155 S.E.2d 114 (1967); *D. & W.*,

Inc. v. Charlotte, 268 N.C. 577, 151 S.E.2d 241 (1966), *supp. op.* 268 N.C. 720, 152 S.E.2d 199 (1966); *High Point Surplus Co. v. Pleasants*, 263 N.C. 587, 139 S.E.2d 892 (1965); *Walker v. Charlotte*, 262 N.C. 697, 138 S.E. 2d 501 (1964); *Orange Speedway, Inc. v. Clayton*, 247 N.C. 528, 101 S.E.2d 406 (1958); *Roller v. Allan*, 245 N.C. 516, 96 S.E.2d 851 (1957); *See also Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915) (Cited in *Orange Speedway, Inc. v. Clayton, supra*).

Since Petitioner secured the injunction it requested, the courts of North Carolina necessarily must have found that the rights of Petitioner were either "impinged" *or* "imminently threatened." 7 Strong's North Carolina Index 3d, *Injunctions*, Section 5.1 (1977).

In light of the first opinion of the North Carolina Court of Appeals, its second decision must be construed to mean that there are elements of a 1983 action in addition to the elements for declaratory and injunctive relief under North Carolina law, and, specifically, that a violation of Fourth Amendment rights must include the imposition of a final penalty or an actual entry, inspection or trespass onto the protected property. Necessarily, under the Court of Appeals interpretation, an imminent threat to violate such rights will not suffice.

On the contrary, the decisions of this Court reflect that the elements of proof are in these respects substantially the same: A threat will suffice. *Steffel v. Thompson, supra*; *Zwickler v. Koota, supra*; *Dombrowski v. Pfister, supra*; *Ex parte Young, supra*.

> "In *Ex parte Young*, . . . the fountainhead of federal injunctions against state prosecutions, the Court characterized the power and its proper

> exercies in broad terms: it would be justified where state officers . . . *threatened or are about to commence proceedings*, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution . . .'". *Dombrowski v. Pfister*, 380 U.S. at 483-84, 85 S.Ct. 1119, 14 L.Ed.2d 27. (Emphasis supplied).

In *Dombrowski*, *supra*, the Court held that, ". . . where, as here, prosecutions *are actually threatened*, this challenge [of the invalidity of the statute], if not clearly frivolous, will establish the threat of irreparable injury required by traditional doctrines of equity." 380 U.S. 490, 85 S.Ct. 1123, 14 L.Ed.2d 31. (Emphasis supplied).

In *Zwickler v. Koota*, *supra*, while the Court abstained from granting the injunctive relief requested because of factors of equity, comity and federalism articulated in *Douglas v. City of Jeannette*, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed.2d 1324 (1943), and *Dombrowski*, *supra*, it never questioned Zwickler's ability to state a claim for relief upon the basis of imminent threats of prosecution. *See* footnote 3, 389 U.S. 244, 88 S.Ct. 393, 19 L.Ed.2d 447.

In *Steffel*, a case which also discusses the questions of abstention, comity and federalism, the Court again made it clear that where threats of prosecution were not "imaginary or speculative," or "chimerical," a claim for relief would be alleged:

> "In these circumstances, it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute which he claims deters the exercise of his constitutional rights. See, e.g.,

> *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968). Moreover, petitioner's challenge is to those specific provisions of state law which have provided the basis for threats of criminal prosecution against him." 415 U.S. 459, 94 S.Ct. 216, 39 L.Ed.2d 514.

While, again, in *Steffel* this Court held injunctive relief inappropriate because of reasons, again, of abstention, equity, federalism and comity, it ordered declaratory judgment entered for the plaintiff.

Obviously, here the questions of abstention, equity, comity and federalism do not apply. Here a federal district court is not enjoining the proceedings of state officials, but rather, a state judge has enjoined a state official from violating federal law. There is here no tension between the state and federal elements of our government. *See Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

A consistent position has been taken generally by the inferior federal courts:

> "The fact that the deprivation has not occurred, but is threatened, does not bar this court from providing relief. It is well settled in equity that an anticipated violation of a right may be enjoined. An anticipated violation of a constitutional right was enjoined in *Dombrowski*, [*supra*] . . ., an action brought under 42 U.S.C. 1983." *Hosey v. Club Van Cortland*, 299 F. Supp. 501, 503 & n. 3 (S.D.N.Y. 1969).

Accord: *Raitport v. Provident National Bank*, 451 F. Supp. 522 (E.D.Pa. 1978); *Evans v. Fullard*, 444 F.Supp. 1334 (W.D.Pa. 1978); *Joiner v. City of Dallas*, 380 F.

Supp. 754 (E.D. Texas 1974), *aff'd*, 419 U.S. 1042, 95 S.Ct. 614, 42 L.Ed.2d 637 (1974). ("While it is not always necessary that potential plaintiffs sustain an actual injury before adjudication of the constitutionality of a statute, *see, e.g., Steffel v. Thompson*, [*supra*], it is necessary that the litigation involve an 'actual controversy' which requires at least the threat of such conduct." 380 F.Supp. at 778 n.25).

As construed by this Court, Section 1983 requires the same elements to be shown to justify an injunction under its authority as North Carolina law requires to be shown to justify an injunction under state law. The common nucleus appears in the record, and the only thing which is necessary to do is grant the fee.

As this Court has noted, the question is one of significant public interest in itself and involves principles of major significance to the concept of federalism. If this Court declines to grant review of the instant denial of attorney's fees under Section 1988, decided without citation to federal or any other authority and upon grounds that clearly contradict the decisions of this Court, then those who seek to vindicate individual rights guaranteed by the federal constitution have no alternative but to foreswear the state courts and seek recourse solely to federal judges. *Maine v. Thiboutot*, ___ U.S. ___, ___, n.12, 100 S.Ct. 2502, 2507, 65 L.Ed.2d ___, ___ (1980). This result would deny residents of North Carolina a right recognized and enforced by the courts of the other states: the right to vindicate their federal rights in the more convenient forum of the state courts without forfeiting an auxiliary remedy so important as attorney's fees. It would also impose upon the federal courts an additional and unnecessary burden.

CONCLUSION

The decision of the Court of Appeals of North Carolina, which the Supreme Court of North Carolina has declined to review, conflicts with the several decisions discussed above, and contravenes the policy of this Court that the state courts must be fully available for the enforcement of federal rights. For this reason, a Writ of Certiorari ought to issue to the Supreme Court of North Carolina to review their judgment in this civil action.

This 1st day of July, 1981.

/s/ HUGH JOSEPH BEARD, JR.
HUGH JOSEPH BEARD, JR.
Counsel for Petitioner
2141 P Street, N.W., Apt. 602
Washington, D. C. 20037
Telephone: (202) 466-2528

/s/ THOMAS J. ASHCRAFT
THOMAS J. ASHCRAFT
Of Counsel for Petitioner
Horack, Talley, Pharr & Lowndes, P.A.
1250 City National Center
Charlotte, North Carolina 28202
Telephone: (704) 377-2500

Appendix

SUPERIOR COURT OF WAKE COUNTY,
NORTH CAROLINA

77-CvS-3344

JOHN ALEXANDER GOODEN, CORNELIUS BUTLER, JR., doing business as C. BUTLER, JR., LUMBER COMPANY, WILLIAM G. McDANIEL, doing business as SHANNON WOOD PRODUCTS, LYNWOOD N. BULLOCK, doing business as LYN'S COACH WORKS, M. M. GILLILAND, doing business as GILLILAND LOGGING COMPANY, and WARD LUMBER COMPANY, a corporation, Individually and upon behalf of all other similarly situated,

Plaintiffs,

v.

JOHN C. BROOKS, Commissioner of Labor of the State of North Carolina,

Defendant.

December 14, 1977

JUDGMENT

THIS CAUSE coming on to be heard before the undersigned judge presiding over the 12 December 1977 Session of Wake County Civil Superior Court, and being heard on Defendant's Motions to Dismiss and for Summary Judgment;

It was stipulated and agreed by the parties to this action that the briefs of counsel and all exhibits thereto, the tran-

script of the prior hearing on Plaintiff's Motion for a Preliminary Injunction, all pleadings and documents filed with the Court, and of those documents described in paragraphs 4, 5, and 6 of Plaintiff's Requests for the Production of Documents be considered by the Court in its determination of this matter.

It was stipulated and agreed by the parties to this action that the motions contained in Defendant's Answer dated 15 September 1977 would be heard by the Court as if the same were made in response to Plaintiff's Amended Complaint.

Plaintiff's verbal request for findings of fact was made after the ruling of the Court in this matter and denied at that time.

The Court having carefully considered the argument and authority propounded by counsel, and it appearing to the Court and the Court having concluded that the Complaint, as amended, fails to state a cause of action upon which relief can be granted; * * * and, in the alternative, should the Amended Complaint state a cause of action, the Court finding that there is no genuine issue as to any material fact * * * and Defendant is entitled to judgment as a matter of law; * * *

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:

1. That Defendant's Motions to Dismiss and for Summary Judgment are granted;

2. That this action is dismissed and all relief sought is denied; and

3. That all costs are taxed to Plaintiffs.

This the 14th day of December, 1977.

/s/ DONALD L. SMITH
Donald L. Smith, Judge Presiding

COURT OF APPEALS OF NORTH CAROLINA

No. 7810SC368

John Alexander GOODEN, Cornelius Butler, Jr., doing business as C. Butler, Jr., Lumber Company, William G. McDaniel, doing business as Shannon Wood Products, Lynwood N. Bullock, doing business as Lyn's Coach Works, M. M. Gilliland, doing business as Gilliland Logging Company, and Ward Lumber Company, a corporation, Individually and upon behalf of all others similarly situated,

v.

John C. BROOKS, Commissioner of Labor of the State of North Carolina.

Feb. 6, 1979.

Appeal by plaintiffs from Donald Smith, Judge. Judgment entered 14 December 1977 in Superior Court, Wake County. Heard in the Court of Appeals 15 November 1978.

Plaintiffs filed this action as representatives of a purported class composed of all persons within the State engaged in businesses dealing with wood products. They allege that defendant Commissioner of Labor intends to inspect the non-public portions of their places of business without a search warrant pursuant to the Occupational Safety & Health Act (OSHA) of North Carolina, violating the North Carolina and United States Constitutions. They further allege that plaintiff Ward Lumber Company (Ward) has been cited and fined for refusal to permit such inspection. Plaintiffs seek to have defendant enjoined from conducting such inspections and from citing and fining those who refuse the inspections. They also ask to have such inspections declared unconstitutional. Two attachments to the complaint, apparently communications from the North Carolina Forestry Association to its members, indicate that OSHA planned to make the wood products industry the subject of its State Emphasis Program for 1977 and 1978 because of the industry's high injury and illness rate and large number of employees.

Plaintiffs filed a motion for a preliminary injunction, attaching to it copies of the OSHA citations of Ward Lumber Company on 19 July 1977 and Ward's letter to OSHA contesting the citations. In response to an order to show cause, Lawrence Weaver, the acting director of OSHA, filed an affidavit setting out the selection criteria of the State Emphasis Program and indicating why the wood products industry met these criteria. The affidavit also stated that on 9 May 1977 an inspection was attempted at Ward Lumber Company, but the OSHA officer was refused entry. An Administrative Inspection Warrant was then obtained from a magistrate, but Ward refused to honor the warrant and permit the inspection. Weaver's affidavit said that it is the policy of the

Department of Labor always to obtain such a warrant when entry for an inspection is refused. Both parties presented testimony at the hearing on the motion, and the motion was denied.

Defendant filed an answer asserting, among other defenses, that the complaint failed to state a claim upon which relief could be granted, and that he was entitled to summary judgment. The court found that the complaint failed to state a claim, and in the alternative that defendant was entitled to summary judgment. Plaintiffs appeal.

Hugh J. Beard, Jr., for plaintiff appellants.

Attorney General Edmisten, by Associate Attorney George W. Lennon, for the State.

ARNOLD, Judge.

Defendant first argues that plaintiffs lack standing to bring this action, since the relief they seek is merely prospective. A party has no standing to enjoin the enforcement of a statute unless he can show that his rights have been impinged or are immediately threatened by the statute. 7 Strong's N.C. Index 3d, Injunctions § 5.1. It is apparent here that with the exception of Ward Lumber Company no plaintiff's rights have been impinged upon by the statute, and we find that the other plaintiffs' rights are not "immediately threatened." The only indication that there may be plans to enforce the statute against them is the existence of the State Emphasis Program. Except with regard to plaintiff Ward Lumber Company the action was appropriately dismissed.

We consider the merits of this appeal as it concerns Ward Lumber Company, which has already been cited and fined for refusing to allow inspections without a warrant and with an administrative inspection warrant.

Plaintiff contends that its complaint did state a claim for relief, on the ground that two North Carolina statutes are unconstitutional. The first of these, G.S. 95-136(a), is the "Inspections" section of the Occupational Safety and Health Act of North Carolina, N.C.G.S. ch. 95, Art. 16. It allows inspections of work areas without search warrants, as follows:

> (a) In order to carry out the purposes of this Article, the Commissioner or Director, or their duly authorized agents, upon presenting appropriate credentials to the owner, operator, or agent in charge, are authorized:
>
> (1) To enter without delay, and at any reasonable time, any factory, plant, establishment, construction site, or other area, work place or environment where work is being performed by an employee of an employer; and
>
> (2) To inspect and investigate during regular working hours, and at other reasonable times, and within reasonable limits, and in a reasonable manner, any such place of employment and all pertinent conditions, processes, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

This provision is essentially identical to Sec. 8(a) of the federal Occupational Safety and Health Act of 1970, 29 USC § 657(a), which the United States Supreme Court found unconstitutional in Marshall v. Barlow's, Inc., 56 L.Ed. 2d 305 (1978). Barlow had denied entrance to the inspector who had no search warrant, and the court said: "We hold that Barlow was entitled to a declaratory judgment that the Act is unconstitutional insofar as it purports to authorize inspections without warrant or its

equivalent and to an injunction enjoining the Act's enforcement to that extent." *Id.* at 319. The State shows us no convincing reason, and we find none, why we should reach a different result in this case. Our "warrantless inspection" statute is essentially identical to the federal one which has been declared unconstitutional as violative of the Fourth Amendment. We find that G.S. 95-136(a) violates the Fourth and Fourteenth Amendments to the United States Constitution to the extent it authorizes warrantless searches, and that plaintiff is entitled to have the enforcement of the statute enjoined to that extent.

Plaintiff also asserts that G.S. 15-27.2(c)(1) is a violation of the United States and North Carolina Constitutions. The statute, providing for the issuance of administrative inspection warrants by a magistrate or clerk of court, reads as follows:

> (c) The issuing officer shall issue the warrant when he is satisfied the following conditions are met:
>
> > (1) The one seeking the warrant must establish under oath or affirmation that the property to be searched or inspected is to be searched or inspected as part of a legally authorized program of inspection which naturally includes that property, or that there is probable cause for believing that there is a condition, object, activity or circumstance which legally justified such a search or inspection of that property.

As plaintiff points out, this statute creates two alternative criteria for determining whether to issue a warrant. The first, the "program of inspection test," is that the property is to be inspected "as part of a legally authorized program of inspection which naturally includes that property." The second is a probable cause test. If an

inspection meets either of these tests a warrant is properly issued under the statute. Plaintiff argues that the program of inspection test does not satisfy the Barlow's requirement of probable cause.

The Court in *Barlow's* established that the meaning of probable cause is not the same in an inspection warrant procedure as it is in the case of a search warrant in a criminal proceeding.

> Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].' . . . A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources . . . would protect an employer's Fourth Amendment rights. 56 L.Ed. 2d at 316.

We find the requirement of G.S. 15-27.2(c)(1) that the property is to be inspected "as part of a legally authorized program of inspection which naturally includes that property comports with the *Barlow's* criterion that "a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources." In light of the Supreme Court's decisions in Camara v. Municipal Court, 387 U.S. 523, 18 L.Ed. 2d 930, 87 S.Ct. 1727 (1967), and Marshall v. Barlow's, Inc., *supra*, we interpret the statute as also requiring a showing to the magistrate that

the general administrative plan for enforcement is based upon "reasonable legislative or administrative standards." Interpreted in this way, G.S. 15-27.2(c)(1) requires a sufficient showing of probable cause, and is constitutional.

We hold, in the interest of justice, that by arguing the constitutionality of G.S. 15-27.2(c)(1) the appellant has also presented for our review the sufficiency of the affidavit on which the administrative warrant was obtained. We find that the affidavit does not make a sufficient showing of the administrative probable cause which the statute requires.

Gregory S. Coulson, Director of the Enforcement Division of the North Carolina Department of Labor, in charge of OSHA inspections throughout the state, testified that "[t]he warrant secured against Ward Lumber Company is based on [our] model affidavit . . . [which] does not describe any reason why that specific property would have violations of the acts within its premises." He described the model affidavit as stating that

> 'Blank' being the name and title of the officer, being duly sworn and examined under oath, says under oath that there is a program of inspection authorized by G.S. 95-129(3), G.S. 95-133(b)(2), and G.S. 95-136(a), which naturally includes the property owned or possessed by 'Blank', this is the owner or possessor, and described as follows: 'Blank' which precisely describes the name, location and address of the property to be inspected with this warrant.

No facts from which the issuing officer could determine whether probable cause existed were included; accordingly, this affidavit is insufficient to support the issuance of an administrative search warrant. Apparently similar affidavits were implicitly disapproved by the court in *Barlow's*,

note 20, and specifically disapproved by the Seventh Circuit in a recent decision relying on *Barlow's*. Weyerhaeuser Co. v. Marshall, 452 F. Supp. 1375 (E.D. Wis. 1978).

The inclusion of the underlying facts in the affidavit is necessary to make the warrant procedure meaningful. In explaining the protections afforded by a warrant, the Supreme Court in *Barlow's* said: "The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers . . . as to when to search and whom to search. A warrant, by contrast, [provides] assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria." 56 L.Ed. 2d at 317-18. These protections do not exist unless it is the *issuing officer* who makes the determination of whether the inspection is part of a "legally authorized program" based on a "general administrative plan derived from neutral sources" that meets "reasonable standards."

This conclusion is in accord with the position of our Supreme Court in State v. Campbell, 282 N.C. 125, 191 S.E. 2d 752 (1972). Although *Campbell* was a criminal case, we hold that the requirements for warrant procedures set out there apply equally to the issuance of administrative inspection warrants, since the purpose of a warrant in either case is to provide for a determination of probable cause by a neutral officer.

Probable cause cannot be shown "by affidavits which are purely conclusory, stating only the affiant's . . . belief that probable cause exists without detailing any of the 'underlying circumstances' upon which that belief is based . . . . Recital of some of the underlying circumstances in the affidavit is essential if the magistrate

is to perform his detached function and not serve merely as a rubber stamp. . . ." U. S. v. Ventresca, 380 U.S. 102, 13 L.Ed. 2d 684, 85 S.Ct. 741 (1965).

> The issuing officer "must judge for himself the persuasiveness of the facts relied on by [an affiant] to show probable cause. He should not accept without question the complainant's mere conclusion . . . ." Giordenello v. U. S., 357 U.S. 480, 2 L.Ed. 2d 1508, 78 S.Ct. 1245 (1958).

Id. at 130-31, 191 S.E. 2d at 756. See also State v. Hayes, 291 N.C. 293, 230 S.E. 2d 146 (1976).

We note that any administrative burden resulting from our decision today will be minimal, since it appears from the record before us that the Department of Labor has already established neutral guidelines and criteria for determining the target industries of enforcement programs and that it does check potential target industries against these criteria. The affidavit of Lawrence A. Weaver, III, Acting Director of the OSHA Division of the North Carolina Department of Labor, apparently tendered to the court in response to an order to show cause, states in pertinent part:

> 5. That in order to effect a significant decrease in the number of job related injuries and illnesses, the North Carolina Department of Labor initiated in 1976 the State Emphasis Program (SEP) concept.
>
> * * * *
>
> 7. That in the industry candidate selection process used by the North Carolina Department of Labor, six selection criteria were established.
>
> 8. That the first criterion is SEVERITY AND TRACTABILITY OF THE PROBLEM such that State

Emphasis candidate industries should represent serious problems both in terms of the number of workers affected and the perceived incidence rates of the safety and health hazards, and that the problem is susceptible to improvement through the State Emphasis Program elements of education, consulting, reporting, and inspection.

9. That the lumber and wood products industry and the furniture industry had accident and illness rates of 12.8 and 11.1 respectively with a total employment of approximately 93,000 people in 1975.

10. That the overall accident and illness rate for the private employment sector in North Carolina was 7.1 and the approximate total employment was 1,680,400 people in 1975.

11. That, due to the high accident and illness rates of lumber and wood products industry and the furniture industry involving approximately 5.6 percent of the total private sector employment of North Carolina, criterion one is met.

12. That the second criterion is an EXISTENCE OF STABLE ENFORCIBLE STANDARDS which are clear, complete and susceptible to inspection.

13. That criterion two is met as there are at least four specific areas of the Occupational Safety and Health Standards, such as 29 CFR 1910.213, 29 CFR 1910.24, 29 CFR 1910.265, and 29 CFR 1910.266, which relate to the lumber and wood products industry and the furniture industry.

14. That the third criterion is GEOGRAPHICAL DISTRIBUTION.

15. That criterion three is met as the lumber and wood products industry and furniture industry are geographically distributed throughout the State of North Carolina.

16. That the Fourth criterion in [sic] POTENTIAL EMPLOYER, EMPLOYEE AND PUBLIC SUPPORT which is important, but not a controlling consideration.

17. That the fourth criterion is met as at least ten educational seminars have been held throughout the state with attendance by over 500 employers and employees of the logging industry and that the North Carolina Department of Labor has historically maintained good relations with and received support from the furniture industry.

18. That the fifth criterion is the existence of OSHA TECHNICAL QUALIFICATIONS through special State Emphasis Program training and a selection area in which OSHA already has qualified staff and equipment.

19. That the fifth criterion is met as the members of all sections of the North Carolina Department of Labor, OSHA Division, have received special training in the selected industries both prior to and after the beginning of the State Emphasis Program and that appropriate necessary staff support and equipment is already in existence.

20. That the sixth criterion is USEFULNESS AS A PROTOTYPE of the selected industry.

21. That by meeting the first five criteria it is expected that the first selected emphasis industry will serve as a useful prototype for future State Emphasis Programs.

22. That the average number of alleged OSHA violations expected to be observed during an inspection of a plant within the selected industry is eight.

23. That the accident and illness incidence rates for the lumber and wood products industry and furniture industry are 12.8 and 11.1 respectively.

24. That these are among the highest in the State of North Carolina.

It merely remains for an agency seeking an administrative search warrant to provide such factual information in the supporting affidavit, so that the magistrate, or clerk, may make an independent determination that the requisite probable cause exists for the general administrative plan for enforcement.

We find that it is further necessary for the agency to make a showing to the magistrate, or clerk, that the general administrative plan for enforcement is being applied on a neutral basis as to the particular establisment to be inspected. Camara v. Municipal Court, *supra*; Weyerhaeuser Co. v. Marshall, *supra*. This assures that the plan will not be discriminatorily applied against a particular establishment for harassment or deception.

In the case *sub judice*, there was no showing from which a magistrate could have independently determined (1) that there existed a legally authorized program of inspection which naturally included the property, (2) that the general administrative plan for enforcement was based upon reasonable legislative or administrative standards, and (3) that the administrative standards were being applied to plaintiff on a neutral basis. Thus the warrant was improperly granted.

Having determined that the warrant procedure of G.S. 15-27.2(c)(1) was not complied with, we reverse, and as a result we find it unnecessary to reach plaintiff's contention that the statute violates Art. I, Sec. 20 of the North Carolina Constitution. *But see* Brooks v. Taylor Tobacco Enterprises, Inc., ___ N.C. App. ___ (No. 7813SC691, 6 February 1978).

Plaintiff Ward Lumber Company was entitled to declaratory judgment that G.S. 95-136(a) is unconstitutional to the extent that it authorizes warrantless searches. Defendant was not entitled to summary judgment. In accordance with this opinion judgment of the trial court is

Reversed.

Judges HEDRICK and VAUGHN concur.

SUPREME COURT OF NORTH CAROLINA

NO. 7810SC368

John Alexander GOODEN, et al

v.

John C. BROOKS, Commissioner of Labor of the State of North Carolina

May 2, 1979

ORDER ALLOWING PETITION FOR DISCRETIONARY REVIEW AND DENYING MOTION TO DISMISS APPEAL

This matter came on to be considered upon Defendant's notice of appeal from the North Carolina Court of Appeals pursuant to G.S. 7A-30 and petition for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31; upon consideration whereof, it is adjudged by the Court in conference, this 1st day of May, 1979, that the petition be allowed and that it be so certified to the North Carolina Court of Appeals. The Plaintiff's motion to dismiss the appeal for lack of a substantial constitutional question is denied. It is futher ordered that the case be and is docketed as of the date of this order's certification.

s/ BROCK, J.
For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this 2d day of May, 1979.

s/ JOHN R. MORGAN
Clerk of the Supreme Court of
North Carolina

cc: North Carolina Court of Appeals
Mr. Edwin M. Speas, Jr., Special Deputy Attorney General
Mr. George W. Lennon, Assistant Attorney General
Mr. Hugh J. Beard, Jr., Attorney at Law

SUPREME COURT OF NORTH CAROLINA

NO. 7810SC368

John Alexander GOODEN, Cornelius BUTLER, Jr., doing business as C. Butler, Jr., Lumber Company, William G. McDANIEL, doing business as Shannon Wood Products, Lynwood N. BULLOCK, doing business as Lyn's Coach Works, M. M. GILLILAND, doing business as Gilliland Logging Company, and Ward Lumber Company, a Corporation, Individually and upon behalf of all others similarly situated,

v.

John C. BROOKS, Commissioner of Labor of the State of North Carolina

December 19, 1979

ORDER

This Court, upon its own initiative, has reconsidered the petition for discretionary review under G.S. 7A-31 of defendant John C. Brooks, Commissioner of Labor of the State of North Carolina to review the opinion of the Court of Appeals reported at 39 N.C. App. 519, 251 S.E. 2d 698 (1979) (opinion by Arnold, J., with Hedrick and Vaughn, J.J. concurring), and has determined that its Order dated 1 May 1979 allowing discretionary review under G.S. 7A-31 was improvidently issued.

Therefore, it is now ordered that the Order allowing

discretionary review under G.S. 7A-31 dated 1 May 1979 entered in this cause be, and hereby is, vacated; and it is further ordered that the proceedings in this cause in this Court are dismissed.

Proceedings dismissed.

Done by the Court in Conference, this 4th day of December, 1979.

s/ CARLTON, J.
For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this 6th day of December, 1979.

s/ JOHN R. MORGAN
Clerk of the Supreme Court
of North Carolina

cc: Hugh J. Beard, Jr., Attorney at Law
Robert E. Rader, Jr., Attorney at Law
George W. Lennon, Assistant Attorney General
North Carolina Court of Appeals

SUPERIOR COURT OF WAKE COUNTY,
NORTH CAROLINA

77 CVS 3344

Ward Lumber Company, a Corporation,
Plaintiff,

vs.

JOHN BROOKS, Commissioner of Labor
of the State of North Carolina,
Defendant.

January 23, 1980

ORDER

THIS CAUSE coming on to be heard before the undersigned Special Judge of the General Court of Justice, Superior Court Division, Wake County, North Carolina, and it appearing to the Court, in accordance with the opinion of the North Carolina Court of Appeals filed on February 6, 1979, that the plaintiff is entitled to summary judgment for the reason that there is no genuine issue as to any material fact, and that the plaintiff is entitled to judgment as a matter of law;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

(A) That the provisions of Section 136A of Article 16 of Chapter 95 of the General Statutes of North Carolina violates the Fourth and Fourteenth Amendments to the Constitution of the United States insofar as it authorizes warrantless inspections, and the same is hereby declared invalid and unconstitutional to that extent.

(B) The defendant, its officers, agents, employees, and all persons acting through, by, or in concert with the defendant are hereby permanently enjoined from inspecting any non-public portions of property of the plaintiff or anyone similarly situated without first obtaining the consent to conduct said search from a person or persons entitled to give the same or without obtaining a search warrant.

(C) This matter is retained on the docket of the Superior Court of Wake County, and parties hereto are to appear before a judge presiding on the 25th day of February, 1980, for the purpose of determining plaintiff's entitlement, if any, to attorney fees or any other matter necessary to a final resolution of this case.

This 23rd day of January, 1980.

s/ DONALD L. SMITH
Special Superior Court Judge

SUPERIOR COURT OF WAKE COUNTY,
NORTH CAROLINA

77 CVS 3344

Ward Lumber Company, a Corporation,
Plaintiff,

vs.

JOHN BROOKS, Commissioner of Labor of the State of North Carolina,
Defendant.

March 13, 1980

ORDER

This lawsuit was initiated by Plaintiff Ward Lumber Company and five other individual Plaintiffs as a purported class action challenging the constitutionality of G.S. 95-136(a) and G.S. 15-27.2. After the presentation of certain evidence, Plaintiff's Motion fo. Preliminary Injunction was denied by the Honorable John C. McConnell on 1 September 1977. Subsequently, this action was dismissed for failure to state a claim upon which relief could be granted and, in the alternative, summary judgment was granted in favor of Defendant by the Honorable Donald L. Smith on 14 December 1977. Plaintiffs appealed to the North Carolina Court of Appeals making broad, general assignments of error, none of which addressed 42 U.S.C. 1983.

Order

In an opinion dated 6 February 1979, the North Carolina Court of Appeals affirmed the judgment below, except as to Plaintiff Ward Lumber Company. GOODEN v. BROOKS, COMR. OF LABOR, 39 N.C. App. 519 (1979). The Court held that Ward Lumber Company was entitled to declaratory judgment holding G.S. 95-136(a) unconstitutional to the extent that it purports to authorize warrantless inspections. On remand, judgment to this effect was entered by the Superior Court of Wake County on 25 February 1980.

This cause came on to be heard and was heard before the undersigned Judge presiding over the 25 February 1980 Civil Session of Wake County Superior Court upon Motion of the remaining Plaintiff for attorney's fees pursuant to 42 U.S.C. 1983 and 1988 and Motion of Defendant for dismissal. After careful consideration of the pleadings, record, argument and briefs of counsel, the Court makes the following:

FINDINGS OF FACT

1. The following facts as enumerated in (a) through (j) below are undisputed between the parties:

a. On 9 May 1977, Safety Officer James A. Wyatt, a duly authorized agent of the North Carolina Department of Labor, presented himself at the premises of Ward Lumber Company and announced his intention to conduct an inspection to determine Plaintiff's compliance with provisions of the Occupational Safety and Health Act of North Carolina (OSHA).

b. At such time and place, inspection was refused by the Plaintiff and Safety Officer Wyatt left the premises.

c. Thereafter, an administrative inspection warrant was issued by a magistrate of the State of North Carolina, County of Bladen, authorizing inspection of Ward Lumber Company to determine its compliance with the Occupational Safety and Health Act of North Carolina.

d. Upon presentation of the aforesaid administrative inspection warrant to management of the Plaintiff, Safety Officer Wyatt was advised that the company did not intend to honor the warrant or permit inspection.

e. Thereafter, Safety Officer Wyatt left the premises.

f. Ward Lumber Company was never inspected to determine its compliance with OSHA.

g. On 19 July 1977, the North Carolina Department of Labor issued to Ward Lumber Company a Citation and Notification of Proposed Penalty proposing a willful Citation and monetary penalty therefor for refusal of the Plaintiff to permit inspection.

h. By letter dated 28 July 1977, counsel for the Plaintiff gave Notice of Contest to said proposed Citation and penalty, thereby initiating administrative proceedings before the Safety and Health Review Board of North Carolina.

i. On 29 July 1977, the Complaint giving rise to this cause of action was filed in the Superior Court of Wake County.

j. The proposed Citation and penalty issued to Ward Lumber Company never became final and the same were voluntarily dismissed by the Safety and Health Review Board of North Carolina.

2. The North Carolina Department of Labor has never inspected any business, over objection, without a warrant issued by a judicial official in accordance with G.S. 15-27.2. It is the policy of the Department of Labor to seek an administrative inspection warrant from an authorized judicial official when an inspection to determine compliance with the Occupational Safety and Health Act of North Carolina is not voluntarily granted.

3. Defendant John C. Brooks is the elected Commissioner of Labor of the State of North Carolina. Commissioner Brooks did not personally participate in or supervise any attempted inspection of Plaintiff Ward Lumber Company.

From the foregoing findings of fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. Article 26, Chapter 1 of the General Statutes of North Carolina, the Uniform Declaratory Judgment Act, grants the General Courts of Justice jurisdiction to entertain an action challenging the constitutionality of a statute of this State by persons directly and adversely affected thereby. Pursuant to this authority, the Court may declare a statute unconstitutional and enjoin enforcement thereof. JERNIGAN v. STATE, 279 N.C. 556, 183 S.E. 2d 259 (1971). Plaintiff's claim for relief was fully disposed of pursuant to the North Carolina Declaratory Judgment Act.

2. The North Carolina Court of Appeals did not hold that the Plaintiff had stated a claim for relief under Section 1983, Title 42 of the United States Code and did not consider or address such claim.

3. Ward Lumber Company has suffered no deprivation of constitutional rights.

Defendant John C. Brooks, Commissioner of Labor of the State of North Carolina, has not been personally involved in, and has not affirmatively promoted a policy sanctioning action which caused Plaintiff any deprivation of constitutional rights. Absent proof of such, Plaintiff cannot establish a violation of 42 U.S.C. 1983.

MONROE v. PAPE, 365 U.S. 162, 81 S.Ct. 473, 5 L.Ed. 2d 492 (1961); RIZZO v. GOODE, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed. 2d 561 (1976); DUCHESNE v. SUGARMAN, 566 F.2d 817 (2d Cir. 1977).

4. As an office of the executive branch of government, Defendant has a qualified immunity from a claim under 42 U.S.C. 1983 based on an alleged violation of a constitutional rights. This qualified immunity is available to Defendant absent proof of violation of an established and settled constitutional right. WOOD v. STRICKLAND, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); SCHEUER v. RHODES, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed. 2d 90 (1974).

The constitutionality of G.S. 95-136(a), which is essentially identical to the inspection provision of the Federal Occupational Safey and Health Act of 1970, was an unsettled area of law until the United States Supreme Court handed down its decision in the case of MARSHALL v. BARLOW'S INC., 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed. 2d 305 (1978).

5. There is no authority in the State of North Carolina or in the majority of the federal circuits which permits or requires the application of a Section 1988 award of attorney's fees to a proceedings in a State court. Waiver of the State's sovereign immunity may not be lightly inferred and statutes waiving this immunity must

be strictly construed. FLOYD v. HIGHWAY COMMISSION, 241 N.C. 461, 85 S.E. 2d 703 (1955). The enactment of Section 1988 in no way waives the sovereign immunity of this State or authorizes a court of this State to make an award against the State treasury.

6. Section 1988, Title 42 of the United States Code is inapplicable to the relief obtained by Plaintiff Ward Lumber Company pursuant to the North Carolina Declartory Judgment Act.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED:

a. That Plaintiff's Motion for Attorney's Fees be, and the same is, denied; and

b. That Defendant's Motion to Dismiss be, and the same is, granted.

This the 12th day of March, 1980.

s/ EDWIN S. PRESTON, JR.
Judge of Superior Court

COURT OF APPEALS OF NORTH CAROLINA

No. 8010SC530

WARD LUMBER COMPANY, A Corporation,
Plaintiff,

v.

John C. BROOKS, Commissioner of Labor of the State of North Carolina,
Defendant.

January 6, 1981

This case is before us for the second time on appeal. The action was instituted by plaintiff Ward Lumber Company and five other individual plaintiffs under the North Carolina Declaratory Judgment Act, N.C. Gen. Stat. § 1-253 *et seq.*, and under 42 U.S.C. § 1983 (1978). It involved a challenge to warrantless OSHA inspections. Our previous opinion, *Gooden v. Brooks, Comr. of Labor*, 39 N.C. App. 519, 251 S.E.2d 698 (1979), affirmed the trial court's dismissal for failure to state a claim upon which relief could be granted as to all plaintiffs except Ward Lumber Company. As to Ward Lumber Company, the appellant on this appeal, we held that it was entitled to a declaratory judgment that N.C.Gen.Stat. § 95-136(a) is unconstitutional to the extent that it purports to authorize warrantless inspections.

Defendant subsequently appealed our decision to the Supreme Court of North Carolina, which granted defendant's petition for discretionary review and denied plain-

tiff's motion to dismiss. *Gooden v. Brooks, Comr. of Labor*, 297 N.C. 299, 254 S.E.2d 923 (1979). The record discloses that after the parties submitted briefs and after oral argument, the Supreme Court vacated its prior order granting discretionary review and dismissed the appeal. *Gooden v. Brooks, Comr. of Labor*, 298 N.C. 806, 261 S.E.2d 919 (1979).

This appeal concerns the denial of plaintiff's request for attorney's fees. On 10 January 1980 plaintiff moved for summary judgment pursuant to our opinion at 39 N.C. App. 519, 251 S.E.2d 698, requesting injunctive and declaratory relief and the award of attorney's fees. Simultaneously, plaintiff filed a motion for fees under The Civil Rights Attorney's Fees Awards Act of 1976, § 2, 42 U.S.C. § 1988 (1978). On 23 January 1980 the superior court granted the injunctive and declaratory relief requested and ordered that the matter be retained on the docket to determine plaintiff's entitlement to attorney's fees. On 15 February 1980 defendant filed a motion to dismiss the request for attorney's fees.

From an order granting defendant's motion to dismiss and denying plaintiff's motion for attorney's fees, plaintiff appeals.

Hugh Joseph Beard, Jr., Charlotte, for plaintiff-appellant.

Atty. Gen. Rufus L. Edmisten by Asst. Atty. Gen. Tiare B. Smiley, Raleigh, for defendant-appellee.

ROBERT M. MARTIN, Judge.

The Civil Rights Attorney's Fees Awards Act of 1976, §2, 42 U.S.C. § 1988 (1978) provides:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§ 1981-1983, 1985, 1986], . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Attorney's fees may be recovered as part of costs in state court proceedings instituted to enforce provisions of 42 U.S.C. § 1983. *Ashley v. Curtis*, 67 A.D.2d 828, 413 N.Y.S.2d 528 (App.Div., 1979). Our previous opinion in this case at 39 N.C.App. 519, 251 S.E.2d 698 did not address the question of whether plaintiff had established a violation of 42 U.S.C. § 1983. Where a claim is based on both a state statute which does not provide for the recovery of attorney's fees and on 42 U.S.C. §1983, it is not necessary that the court base its decision on § 1983 in order for the prevailing party to be entitled to attorney's fees under 42 U.S.C. § 1988. If the court does not address the § 1983 claim, but rather decides the case on the basis of the state statute, the test for determining whether the prevailing party is entitled to attorney's fees is two-pronged: (1) was there a substantial claim under § 1983 and (2) was there a common nucleus of operative facts? *Kimbrough v. Arkansas Activities Ass'n*, 574 F.2d 423 (8th Cir. 1978); *Seals v. Quarterly County Court, Etc.*, 562 F.2d 390 (6th Cir. 1977); Annot., 43 A.L.R.Fed. 243 (1979); *see also Southeast Legal Defense Group v. Adams*, 436 F.Supp. 891 (D.Or. 1977). H.R.Rep.No. 94-1558, 94th Cong., 2d Sess. 4, n. 7 (1976) states that where a court decides the case on the non-fee claim,

> if the claim for which fees may be awarded meets the "substantiality" test, *see Hagans v. Lavine*, *supra*; [415 U.S. 528, 94 S.Ct 1372, 39 L.Ed.2d 577

(1974)] *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), attorney's fees may be allowed ever though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact."

The court below found that 42 U.S.C. § 1988 was inapplicable to the relief obtained by the plaintiff pursuant to the North Carolina Declaratory Judgment Act, N.C. Gen. Stat. § 1-253 *et seq*. The dispositive issue on this appeal, as plaintiff-appellant concedes in its brief, is "whether there was a substantial claim under Section 1983 and a common nucleus of operative facts between the 1983 claim and the Declaratory Judgment claim."

42 U.S.C. § 1983 (1978) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The record discloses that although a citation and notification of proposed penalty were issued to plaintiff, plaintiff contested the citation and proposed penalty and subsequently the defendant voluntarily dismissed that portion of the administrative proceeding related to plaintiff's refusal to honor the administrative inspection warrant. In addition, the record discloses that plaintiff's place of business was not inspected during the pendency

of this litigation. Plaintiff therefore was not deprived of any constitutional rights as a result of the issuance of the invalid warrant. Simply stated, plaintiff has failed to show any deprivation of rights as required in order to claim relief under 42 U.S.C. § 1983. As plaintiff has failed to meet the first prong of the test referred to above, a substantial claim under 42 U.S.C. § 1983, and thus is not entitled to recover its attorney's fees under 42 U.S.C. § 1988, we will not address the issue of whether plaintiff has met the second prong of that test.

Our decision renders any possible error in the court's order dismissing plaintiff's motion for attorney's fees nonprejudicial.

Affirmed.

VAUGHN and WELLS, JJ., concur.

SUPREME COURT OF NORTH CAROLINA

(8010SC530)

WARD LUMBER COMPANY

v.

JOHN C. BROOKS, Commissioner of Labor of State of North Carolina

---

April 17, 1981

JUDGMENT DISMISSING APPEAL ON MOTION OF DEFENDANT AND DENYING PETITION FOR DISCRETIONARY REVIEW

This matter came on to be considered upon plaintiff's notice of appeal from the North Carolina Court of Appeals, pursuant to G. S. 7A-30, upon defendant's motion to dismiss the appeal for lack of a substantial constitutional question, and upon plaintiff's petition for discretionary review of the decision of the North Carolina Court of Appeals, pursuant to G. S. 7A-31; upon consideration whereof, it is adjudged by the Court in conference, this 7th day of April, 1981, that the motion to dismiss the appeal be allowed, that the petition for discretionary review be denied, and that it be so certified to the North Carolina Court of Appeals.

It is considered and adjudged further that the defendant do pay the sum of NINE AND NO/100 DOLLARS ($9.00) and execution issue therefor.

s/ MEYER, J.
For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this 17 day of April, 1981.

s/ JOHN R. MORGAN
John R. Morgan
Clerk of the Supreme Court
of North Carolina

cc: North Carolina Court of Appeals
Mr. Hugh Joseph Beard, Jr., Attorney at Law
Mr. Tiare B. Smiley, Assistant Attorney General

Opposition

FILED
NOV 14 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81 - 241

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

WARD LUMBER COMPANY, *a corporation,*
Petitioner,

v.

JOHN C. BROOKS, Commissioner of Labor
of the State of North Carolina,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

RUFUS L. EDMISTEN
Attorney General

Tiare B. Smiley
Assistant Attorney General
North Carolina Dept. of Justice

COUNSEL FOR RESPONDENT

111 E. North Street
Raleigh, North Carolina 27601
Telephone: (919) 733-4895

DI CESARE - Printing — 331-6161 — Washington, D.C. 20006

QUESTION PRESENTED

WHETHER A STATE COURT MAY APPLY A STANDARD OF LAW TO A MOTION FOR ATTORNEY'S FEES UNDER 42 U.S.C. 1988 DIFFERENT FROM THE STANDARD APPLIED IN FEDERAL COURTS.

PARTIES

THE PARTIES TO THE PROCEEDING IN THE NORTH CAROLINA SUPREME COURT, WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED, ARE WARD LUMBER COMPANY, A NORTH CAROLINA CORPORATION WITH NO PARENT, SUBSIDIARY OR AFFILIATE CORPORATIONS, AND JOHN C. BROOKS, THE ELECTED COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA.

TABLE OF CONTENTS

Page

Question Presented i
Parties i
Table of Authorities iii
Opinions Below 1
Jurisdiction 3
Constitutional and Statutory Provisions Involved 3
Statement of the Case and Facts 4
Argument 11
Conclusion 18
Appendix A-1

TABLE OF AUTHORITIES

CASES **Page**

Adams v. North Carolina Department of Natural & Economic Resources, 295 N.C. 683 (1978) 17

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 17

Baker v. McCollan, 443 U.S. 137 (1979) 17

Brennan v. Gibson's Products, 407 F.Supp. 1014 (1977) 14

Camera v. Municpal Court, 387 U.S. 523 (1967) 10

Empire Steel Mfg. Co. V. Marshall, 437 F.Supp. 873 (1977) 14

Hagans v. Lavine, 415 U.S. 528 (1974) 15

Jernigan v. State, 279 N.C. 566 (1971) 12

Kimbrough v. Arkansas Activities Ass'n, 574 F.2d 423 (8th Cir. 1978) 15,16

Maine v. Thiboutot, 448 U.S. 1 (1980) 15

Marshall v. Barlow's, Inc. 436 U.S. 307 (1978) 9,10,13,14

Martinez v. California, 444 U.S. 277 (1980) 17

Morales v. Haines,
486 F.2d 880 (7th Cir. 1973) 16

Milton Morris v. U.S. Department of Labor
439 F.Supp. 1014 (1977) 14

Seals v. Quarterly County Court, Etc.,
562 F.2d 390 (6th Cir. 1977) 15

Steffel v. Thompson,
415 U.S. 452 (1974) 17

United Mine Workers v. Gibbs,
383 U.S. 715 (1966) 16

CONSTITUTIONAL PROVISIONS

Article III, United States Constitution 17

Amendment IV, United States Constitution ..... passim

Amendment XIV, United States Constitution . 3,8,10,13,14

Article I, § 20, North Carolina Constitution 8

STATUTES

28 U.S.C. § 1257(3) 3

28 U.S.C. § 2201 17

29 U.S.C. § 651, *et seq.* 4

29 U.S.C. § 657(a) 5,13

29 U.S.C. § 667 4

42 U.S.C. § 1983 ..... passim

42 U.S.C. § 1988 ..... passim

N.C.G.S. 1-253, *et seq.* 7,12
N.C.G.S. 15-27.2 ..... passim
N.C.G.S. 95-136 (a) ..... passim
N.C.G.S. 95-137 4,6

MISCELLANEOUS

29 C.F.R. § 1902 4
H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4 n. (1976) ..15,16
5 N.C. Index 3d Declaratory Judgment Act § 3 17
7 N.C. Index 3d Injunctions § 5.1 17

NO. 81 - 241

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

WARD LUMBER COMPANY, a corportion,
Petitioner,

v.

JOHN C. BROOKS, Commissioner of Labor
of the State of North Carolina,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

OPINIONS BELOW

In an unreported order filed December 14, 1977, the Superior Court of Wake County, North Carolina, granted Respondent's Motions to Dismiss and for Summary Judgment and dismissed the action filed by Petitioner and five other individual plaintiffs pursuant to the Uniform Declaratory Judgment Act, Article 26 of Chapter 1 of the North Carolina General Statutes, and the Civil Rights Act of 1871, 42 U.S.C. § 1983. This order is set forth in the Appendix to Petitioner Ward Lumber Company's Petition at Page A-1.

The first opinion of the North Carolina Court of Appeals affirming the trial court's dismissal as to all plaintiffs except Ward Lumber Company, and reversing the judgment as to Peitioner, is reported at 39 N.C. App. 519, 251 S.E.2d 698 (1979), and is set forth in the Appendix to Petitioner's Petition

at Page A-3. Lthe jurisdictional basis of the opinion of the Court of Appeals was appealed by the Commissioner of Labor of North Carolina to the Supreme Court of North Carolina, which granted discretionary review in an order reported at 297 N.C. 299, 254 S.E.2d 923 (1979), and is set forth in the Appendix to Petitioner's Petition at page A-16. After briefing and oral argument, the Supreme Court of North Carolina vacated its order granting discretionary review and dismissed the appeal in an order reported at 298 N.C. 806, 261 S.E.2d 919 (1979), and is set forth in the Appendix to Petitioner's Petition at Page A-18.

Upon remand, the Superior Court of Wake County filed an unreported order January 23, 1980, in accordance with the opinion of the Court of Appeals, declaring the provisions of Section 136A of Article 16 of Chapter 95 of the General Statutes of North Carolina to be unconstitutional insofar as it authorizes warrantless inspections and enjoining the Commissioner of Labor of North Carolina and his agents from making inspections without obtaining consent or a search warrant. This order is set forth in the Appendix to Petitioner's Petition at Page A-20. A second unreported order filed March 13, 1980, granted Respondent's Motion to Dismiss and denied the Motion for Attorney's Fees filed by Petitioner pursuant to the Civil Rights Attorney Fees Award Act of 1976, 42 U.S.C. § 1988 (1978). This order is set forth in the Appendix to Petitioner's Petition at Page A-22. The second opinion of the North Carolina Court of Appeals affirming the lower court's order dismissing Petitioner's motion for attorney's fees is reported at 50 N.C. App. 294, 273 S.E.2d 331 (1981), and is set forth in the Appendix to Petitioner's Petition at Page A-28. Respondent's motion to dismiss appeal was allowed and Petitioner's petition for discretionary review was denied by the Supreme Court of North Carolina in an order reported at 302 N.C. 398, 279 S.E.2d 357 (1981), and is set forth in the Appendix to Petitioner's Petition at Page A-33.

From this last order of the Supreme Court of North Carolina, Petitioner Ward Lumber Company has filed this

Petition for Writ of Certiorari to the Supreme Court of North Carolina.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

Amendment XIV.

Sec. 1. ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

United States Code:

42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

42 U.S.C. § 1988.

Sec. 2. ...In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI or the Civil Rights Act of 1964, the court, in its descretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

North Carolina General Statutes:

The following North Carolina statutes are set forth verbatim in the appendix.

§ 15-27.2
§ 95-136(a)
§ 95-137

STATEMENT OF THE CASE AND FACTS

On May 9, 1977, Mr. James A. Wyatt, a safety officer employed by the North Carolina Department of Labor, Office of Occupational Safety and Health,[1] presented himself at the premises of Ward Lumber Company for the purpose of conducting an inspection to determine the company's compliance with the Occupational Safety and Health Act of

---

[1]The Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.*, authorizes and empowers the United States Department of Labor to promulgate and enforce safety and health standards throughout the country. Pursuant to 29 C.F.R. 1902, the North Carolina Department of Labor operates a state administered OSHA program under federal supervision. So long as a state program proves "as effective as" the federal OSHA program, the federal government will subsidize the enforcement of the state law and will suspend enforcement of the federal law within that state. 29 U.S.C. § 667.

North Carolina (hereinafter OSHANC).[2] Upon the company president's refusal to consent to inspection, the safety officer left the premises without attempting in any way to enter and inspect the workplace of the establishment over Petitioner's objections.

In accordance with the established policy of the North Carolina Department of Labor in cases where voluntary OSHANC inspection is refused, an administrative inspection warrant was sought by the Office of Occupational Safety and Health (hereinafter OSH) pursuant to G.S. 15-27.2(c) (1).[3] Thereafter an administrative inspection warrant was issued by a magistrate of the State of North Carolina, County of Bladen, authorizing inspection of Ward Lumber Company

---

[2]G.S. 95-136(a) (1), which is essentially identical to Sec. 8(a) of the federal Occupational Safety and Health Act of 1970, 29 U.S.C. § 657(a), provides:

> In order to carry out the purposes of this Article, the Commissioner or Director, or their duly authorized agents, upon presenting appropriate credentials to the owner, operator, or agent in charge, are authorized:
>
> (1) To enter without delay, and at any reasonable time, any factory, plant, establishment, construction site or other area, work place or environment where work is being performed by an employee of an employer.

[3]G.S. 15-27.2(c) (1) provides for the issuance of administrative inspection warrants by a judge, magistrate, or clerk of court, and reads as follows:

> (c) The issuing officer shall issue the warrant when he is satisfied the following conditions are met:
>
> (1) The one seeking the warrant must establish under oath or affirmation that the property to be searched or inspected is to be searched or inspected as part of a legally authorized program of inspection which naturally includes that property, or that there is probable cause for believing that there is a condition, object, activity or circumstance which legally justified such a search or inspection of that property.

and was presented to the company president by the safety officer. Again, upon the Petitioner's refusal to allow inspection even pursuant to the magistrate's warrant, the safety officer left the premises. Ward Lumber Company was in fact never entered and inspected to determine its compliance with OSHANC.

On July 9, 1977, the Director of OSH issued Ward Lumber Company a Citation and Notification of Proposed Penalty proposing a citation and monetary penalty for refusal to permit inspection. The company gave notice of contest to said proposal on July 28, 1977, thereby initiating binding administrative proceedings before the Safety and Health Review Board of North Carolina. The proposed penalty issued by the OSH Director was never recommended to the Commissioner of Labor pursuant to G.S 95-137[4] because of

---

[4]G.S. 95-137 provides in part as follows:

(b) Procedure for Enforcement. - (1) If, after an inspection or investigation, the Director issues a citation under any provisions of this Article, he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of any penalty, if any, he has recommended to the Commissioner to be proposed under the provisions of this Article and that the employer has 15 working days within which to notify the Director that he wishes to contest the citation or proposed assessment of penalty. If, within 15 working days from the receipt of the notice issued by the Director, the employer fails to notify the Director that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under the provisions of this Article within such time, the citation and the assessment as proposed to the Commissioner shall be deemed final and not subject to review by any court.

the notice of contest and because of its eventual dismissal.[5] Thus the proposal never became a final order and the claim pursuant to § 1983 based on such proposal was rendered moot.

On July 29, 1979, civil litigation was initiated by Petitioner's filing a complaint in the Superior Court of Wake County pursuant to the authority of Article 26 of Chapter 1 of the North Carolina General Statutes, § 253, *et seq.*, the Uniform Declaratory Judgment Act, seeking to have G.S. 95-136 and G.S. 15-27.2(c) (1) declared unconstitutional because they provided for entry and inspection without a search warrant based on precepts of criminal probable cause.

After an evidentiary hearing, Petitioner's motion for a preliminary injuction against the Commissioner of Labor and his agents was denied September 1, 1977. This was how matters stood, until, at the Commissioner's request, the action was calendared for hearing December 12, 1977. At this hearing, Petitioner's motion, filed only one week earlier, to amend the complaint to assert a claim under 42 U.S.C. § 1983, was granted. (The issue of a § 1983 cause of action was never argued, presented or mentioned again by Petitioner until after the first opinion of the North Carolina Court of Appeals had been handed down.) With both parties stipulating to the

---

[5]Counsel for Respondent has also represented to the courts that the citation and proposed penalty for failure to allow entry pursuant to a warrant would have been dismissed on its merits by the Safety and Health Review Board. Under OSH operating procedures, proposed citations and penalties are issued by the Director for violations by employers of specific safety standards and for violations of the employer's duty to provide a place of employment free from recognized hazards that are likely to cause death or serious physical harm to one's employees. The North Carolina Department of Labor had never before, and has not since, issued such a citation, and in fact counsel knows of no such citation anywhere in the country by any OSHA programs. There are no regulations, policies, or Review Board rulings which even hint that a citation and penalty proposed for failure to allow inspection would by upheld.

testimony and record from the earlier hearing on the motion for a preliminary injunction, only cursory proceedings were held at the December hearing on the Respondent's motion to dismiss and for summary judgment. The record before the Superior Court clearly showed that the Commissioner of Labor and his agents never attempted to inspect Ward Lumber Company, or any other establishment, over objection without obtaining an adminstrative search warrant issued by a judicial official pursuant to G.S. 15-27.2; and further that it was the policy of OSH to seek such a warrant when inspection could not be accomplished by consent. Furthermore, the State had shown on the record that the particular warrant form which had been used in the attempted inspection of this Petitioner had been discontinued and a revised format using more specificity was being prepared by the North Carolina Attorney General's Office.

Upon this clear record, coupled with the representations by counsel for the State that the proposed citation and penalty pending before the Saftety and Health Review Board was to be dismissed by OSH and that there was no prospect of such a citation and penalty becoming final (see footnotes 4 and 5 *supra.*), the Superior Court granted summary judgment dismissing the action for failure to state a cause of action, or in the alternative that there was no genuine issue as to any material fact. Shortly after entry of judgment against Petitioner by the trial court, OSH moved to voluntarily dismiss that portion of the administrative proceeding related to Petitioner's refusal to allow entry and to honor the administrative inspection warrant, and it was formally dismissed by the Safety and Health Review Board April 12, 1978.

Petitioner appealed to the North Carolina Court of Appeals, arguing that the complaint stated a claim for declaratory and injunctive relief on the grounds that G.S. 95-136(a) and G.S. 15-27.2(c)(1) violated the Fourth and Fourteenth Amendments to the Constitution of the United States and Section 20, Article I of the Constitution of North

Carolina. The thrust of Petitioner's arguments was to have the two North Carolina statutes declared unconstitutional because they provided for entry and inspection on private property without a search warrant based on criminal probable cause. Petitioner sought a decision by the Court of Appeals on G.S. 95-136 paralleling the United States Supreme Court ruling on almost identical federal OSHA inspection provisions in *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 56 L.Ed.2d 305, 98 S.Ct. 1816 (1978). In fact, proceeedings before the North Carolina Court of Appeals were delayed by the parties so that the landmark federal case, which arose in 1975 and which was then pending before this Court, could be decided. It was recognized by all parties that the decision in *Barlow's* would settle the question of warrantless OSHA inspections in all jursidictions and would spell out the permissible parameters of administrative probable cause. On appeal, Petitioner did not address the summary dismissal of his § 1983 claim and made no arguments relating to whether the complaint stated a § 1983 claim against an appropriate defendant or the authority and jurisdiction of the State courts to entertain or enforce the federal claim.

After the decision in *Barlow's* was handed down, the North Carolina Court of Appeals issued its opinion and found the necessary standing to consider Petitioner's action because the rights of Ward Lumber Company had been impinged upon by the statute in that this company had "already been cited and fined for refusing to allow inspections without a warrant and with an administrative inspection warrant." 39 N.C. App. 519 (A. to Pet's. Pet. p. A-5.) The State has always respectfully contended that this statement by the appellate court was somewhat overbroad considering the uncontradicted evidence in the record on the nature and status of the proposed citation and notification of proposed penalty.

Citing the authority of *Marshall v. Barlow's, supra*, the Court of Appeals then reversed the decision of the Superior Court holding that the North Carolina inspection provision G.S. 95-136 (a), which was essentially identical to the federal

provision, violated the Fourth and Fourteenth Amendments to the United States Constitution to the extent it authorized warrantless searches, and that Petitioner was entitled to have the enforcement of the statute enjoined to that extent. (A. to Pet's. Pet. pp. A6 - A7.) The State has continued to argue that the injunction authorized by the Court against the Commissioner of Labor may be somewhat superfluous and ineffective in that he is enjoined from doing that which he has never done.

The opinion of the Court of Appeals rejected Petitioner's claims concerning the provisions of G.S. 15-27.2(c) (1), and after interpreting the statute to meet the requirements stated in *Barlow's* and in *Camera v. Municipal Court*, 387 U.S. 523, 18 L.Ed.2d 930, 87 S.Ct. 1727 (1967), held the statute to be constitutional. (A. to Pet's. Pet. pp. A8 - A9.) The Court also went on to consider the sufficiency of the particular affidavit used to obtain the administrative search warrant and found that there was not a sufficient showing of administrative probable cause as required by the statute, and thus the warrant was improperly granted by the Magistrate. (A. to Pet's. Pet. pp. A9 and A14.) This portion of the Court's opinion is the most significant in terms of establishing legal precedent in North Carolina, and perhaps explains the Court's eagerness to find sufficient jurisdiction to consider this cause. This opinion has engrafted the constitutionally mandated requirements articulated by the United States Supreme Court to the language of the North Carolina statute so that as now interpreted the statute meets constitutional muster.

Respondent Brooks entered an appeal to the Supreme Court of North Carolina and filed a petition for discretionary review contesting the jurisdictional basis of the decision of the Court of Appeals. Review was granted, 297N.C. 299, 254 S.E.2d 923 (1979). After the filing of briefs and after oral arguments had been held, the Supreme Court reconsidered the petition and determined that the order allowing discretionary review was improvidently granted. Its prior order was vacated and the proceedings were dismissed. 298 N.C. 806, 261 S.E.2d 919 (1979).

Thereafter Petitioner moved for summary judgment pursuant to the opinion of the Court of Appeals, requesting injunctive and declaratory relief. Simultaneously, Petitioner filed a motion seeking attorney's fees under 42 U.S.C § 1988. The Superior Court entered its order June 23, 1980, declaring G.S. 95-136 invalid and unconstitutional to the extent it authorized warrantless inspections; furthermore, Respondent and his agents were permanently enjoined from inspecting non-public portions of the Petitioner's business without first obtaining consent or without obtaining a search warrant. (A. to Pet's Pet. pp. A20-A21.) The matter was retained on the docket of the Superior Court of Wake County for a later determination of Petitioner's entitlement, if any, to attorney's fees. Respondent filed a motion to dismiss and on March 13, 1979, the Superior Court granted said motion and denied Petitioner's motion for fees.

This ruling denying attorney's fees was the subject matter of the second appeal by Petitioner in this cause to the North Carolina Court of Appeals. The Court of Appeals affirmed the lower court's order and held that Petitioner had failed to show any deprivation of consititutional rights or a substantial claim under 42 U.S.C. § 1983, and thus was not entitled to recover attorney's fees under 42 U.S.C. § 1988. 50 N.C. at App. 294 (A. to Pet's Pet. p. A-32.) The Supreme Court of North Carolina thereafter dismissed Petitioner's appeal and denied discretionary review from the ruling of the Court of Appeals. 302 N.C. 398 (A. to Pet's Pet. p. A-33.) From the judgments of the Supreme Court of North Carolina and the North Carolina Court of Appeals, Petitioner now seeks review by writ of certiorari from this Court.

ARGUMENT

Writ of certiorari should be denied in this matter because the judgments of the State appellate courts do not conflict with the decisions of this Court and the State courts have in no way applied a standard of law to Petitioner's motion for attorney's fees under 42 U.S.C. § 1988, different from the standard applied in the federal courts.

Petitioner originally filed his complaint pursuant to the North Carolina Declaratory Judgment Act, G.S. 1-253, *et seq.* The constitutionality of a statute may be challenged under this Act and the court may declare a statute unconstitutional and enjoin its enforcement. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971). Thus, Petitioner's complaint could be fully disposed of under the State provisions. At the eleventh hour in the trial court proceedings, Petitioner did amend his complaint to include a claim pursuant to 42 U.S.C. § 1983.

However, the elements, issues and jurisdiction of a 42 U.S.C. § 1983 cause were not argued to the trial court by the Petitioner, and the appellate record of the first appeal to the North Carolina Court of Appeals in this matter is also totally silent as to § 1983. In its second opinion, the Court of Appeals indicated that its previous opinion in the case did not address the question of whether plaintiff had established a violation of 42 U.S.C. § 1983. (A. to Pet's. Pet. p. A-30.) From the analysis employed by the Court, it is evident that the Court of Appeals felt that the Petitioner's case had been decided on the basis of the State statute without ever addressing the § 1983 claim:

> Where a claim is based on both a state statute which does not provide for recovery of attorney's fees and on 42 U.S.C.§ 1983, it is not necessary that the court base its decision on § 1983 in order for the prevailing party to be entitled to attorney's fees udner 42 U.S.C. § 1988. If the court does not address the § 1983 claim, but rather decides the case on the basis of the state statute, the test for determining whether the prevailing party is entitled to attorney's fees is two-pronged: (1) was there a substantial claim under § 1983 and (2) was there a common nucleus of operative facts? [Citations omitted.]

50 N.C. App. 294, 273 S.E.2d 331 (1981) (A to Pet's. Pet. pA.-30).

This was the legal test urged upon the Court by the Petitioner as the dispositive issue on appeal. However, in determining this question, the Court found from the record

that although the citation and notification of proposed penalty were issued to Petitioner, Petitioner contested the citation and proposed penalty and subsequently the Respondent voluntarily dismissed that portion of the administrative proceeding related to Petitioner's refusal to honor the administrative inspection warrant. (A. to Pet's. Pet. p. A-30.) This conclusion by the Court casts considerable doubt upon the strength of the jurisdictional basis found by the Court in its first opinion. For this reason, the Court refused under the unusual circumstances of this case to blindly accept the argument that because it had been willing to extend its jurisdiction under a State statute in order to enunciate a State decision in harmony with a landmark and binding federal precedent, that it must therefore automatically find that Petitioner had presented a substantial claim under § 1983.

Besides the questionable factual basis used by the Court in its first opinion to find that Petitioner's rights had been impinged upon, injunctive relief was allowed by the Court based primarily on the inapposite facts and results of *Marshall v. Barlow's, supra.* The Court held in its first opinion:

> This provision is essentially identical to Sec. 8(a) of the federal Occupational Safety and Health Act of 1970, 29 U.S.C. § 657(a), which the United States Supreme Court found unconstitutional in *Marshall v. Barlow's, Inc.*, 56 L.Ed2d 305 (1978). Barlow had denied entrance to the inspector who had no search warrant, and the court said: "We hold that Barlow was entitled to a declaratory judgment that the Act is unconstitutional insofar as it purports to authorize inspections without warrant or its equivalent and to an injunction enjoining the Act's enforcement to that extent." *Id.* at 319. The State shows us no convincing reason, and we find none, why we should reach a different result in this case. Our "warrantless inspection" statute is essentially identical to the federal one which has been declared unconstitutional as violative of the Fourth Amendment. We find that G.S. 95-136(a) violates

> the Fourth and Fourteenth Amendments to the United States Constitution to the extent it authorizes warrantless searches, and that plaintiff is entitled to have the enforcement of the statute enjoined to that extent.

39 N.C. App. 519, 251 S.E.2d 698 (1979) (A. to Pet's. Pet. pp. A6-A7.)

Although an injunction was granted in *Barlow's*, the facts of that case were much more compelling. The litigation in *Barlow's* was commenced by the United States Secretary of Labor by petitioning the United States District Court for an order compelling inspection pursuant to OSHA's statutory authority and without a warrant. In the case at bar, the North Carolina Department of Labor never attempted to enforce G.S. 95-136, but instead sought an administrative warrant issued by a neutral judicial official. Extrapolating the precise language used and the relief granted in *Barlow's* to the case at bar, the Court remanded the cause to the lower court to enjoin the Commissioner of Labor of North Carolina from doing that which he had never done, i.e., compelling entry and inspection without a warrant.

The constitutionality of the federal and State warrantless inspection provisions had been brought into question long before the *Barlow's* decision was announced in 1978. The proceedings in *Barlow's* commenced in 1975. While this ruling was on appeal to the United States Supreme Court, a number of other courts agreed that a warrant was required, although they declined to invalidate the inspection provisions. See, *Brennan v. Gibson's Products*, 407 F. Supp. 1014 (1977); *Empire Steel Mfg. Co. v. Marshall*, 437 F. Supp. 873 (1977); *Milton Morris v. U.S. Department of Labor*, 439 F. Supp. 1014 (1977). For this reason, OSH had never attempted to inspect over objection and without a warrant. Hence, there being no practical effect to the injunction allowed by the Court's first decision, the Court of Appeals did not err by taking a more careful look at the question whether Petitioner had established a substantial claim under § 1983. Under the unique circumstances of the case at bar, the issuance of an injunction under the State statutory provisions did not

automatically settle the substantiality of Petitioner's claim for jurisdiction pursuant to § 1983.

The State has previously conceded, and the North Carolina Court of Appeals agreed in its opinion, that a state court may entertain a claim brought prusuant to 42 U.S.C. § 1983. *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980). Furthermore, the Court's decision in *Maine v. Thiboutot, supra*, clearly established that the state court may award attorney's fees in a sate court proceeding pursuant to 42 U.S.C. § 1988, and that such an award may be made against the state. However, the provisions of § 1988 are only available to a party if he is a prevailing plaintiff in a state court proceeding enforcing one of the provisions listed in § 1988, such as § 1983.

The Court of Appeals recognized in its second opinion that the prevailing plaintiff concept can be extended to a plaintiff who prevails on the basis of a state statute even if the § 1983 claim is not addressed. As urged by the Petitioner, the Court relied on the "substantiality test" articulated in a footnote to the Report of the House Judiciary Committee accompanying the Civil Rights Attorney Fee Award Act legislation. H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4 n. 7 (1976). Other courts have considered this report as the unambiguous expression of congressional intent. *Kimbrough v. Arkansas Activities Ass'n*, 574 F.2d 423 (8th Cir. 1978); *Seals v. Quarterly County Court, Etc.*, 562 F.2d 390 (6th Cir. 1977).

The use of the "substantiality test" by Petitioner and the Court of Appeals may not be entirely accurate. The substantiality test referred to by the House Judiciary Committee is jurisdictional in nature. Before federal pendent jurisdiction can be exercised over a non-federal claim, the trial court must first make a threshold determination that a substantial federal claim, arising from the same nucleus of operative fact, is raised by the allegations of the complaint. Without the existence of a substantial federal claim, no *federal pendent jurisdiction over the non-federal claim exists. Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct 1372, 39 L.Ed2d

577 (1974); *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); *Kimbrough v. Arkansas Activities Ass'n, supra.* Obviously, in a state court there is no threshold question regarding the substantiality or the relationship of a fedral claim to a state claim in order for the state to assume jurisdiction over both claims. Thus, unlike a dual claim in the federal courts, the two cliams may co-exist in state court with no determination being reached on the substantive relationship of the two claims. Therefore, a decision of the state claim in this cause of action, which does not provide for attorney's fees, cannot be bootstrapped as a decision on the substantiality of the federal claim, which does allow for th award of attorney's fees.

However, the same footnote to the Report of the House Judiciary Committee referred to above, does give guidance in determining whether Petitioner is entitled to attorney's fees under § 1988 because he prevailed to a limited extent on his state cause of action:

> To the extent a plaintiff joins a claim under one of the statutes enumerated in [the Act] with a claim that does not allow attorney's fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. *Morales v. Haines*, 486 F.2d 880 (7th Cir. 1973).

H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4 n. 7 (1976). In finding that Petitioner had not presented a substantial claim under § 1983, the Court of Appeals in its second opinion did in fact make a determination on Petitioner's non-fee claim under § 1983.

First, the Court found that Petitioner's place of business was not inspected. It further found that the proposed citation and penalty were voluntarily dismissed. These findings show that Petitioner Ward Lumber Company did not establish a case or controversy between the parties under State law,

Adams v. North Carolina Department of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978); 5 N.C. Index 3d, Declaratory Judgment Act § 3; or an "actual controversy" as required by Art. III of the Constitution and 28 U.S.C. § 2201, the Federal Declaratory Judgment Act. *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). In addition, the Court's findings show that Petitioner's rights had not been impinged upon or immediately threatened by the statute which was ultimately declared unconstitutional, as required by State law, 7 N.C. Index 3d, Injunctions § 5.1; nor had Petitioner demonstrated irreparable injury, the traditional prerequisite to injunctive relief under federal law. *Steffel v. Thompson, supra.*

Furthermore, a § 1983 claim has two essential components: first, a plaintiff must demonstrate a deprivation of right secured by the Constitution and laws of the United States; and second, that the defendant acted under color of state law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Even though a state official is subject to a § 1983 cause of action seeking prospective injunctive relief, the first inquiry and the very essence of a § 1983 suit is whether or not the plaintiff has been deprived of a constitutional right. *Martinez v. California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980); *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979). The North Carolina Court of Appeals properly concluded that plaintiff had not been deprived of any constitutional rights and had shown no claim for relief under 42 U.S.C. § 1983.

The constitutional violation asserted by Petitioner was a violation of the Fourth Amendment prohibition from warrantless searches. Petitioner never suffered a deprivation of this constitutional right at the behest of John C. Brooks individually or in his official capacity. Nor was Petitioner threatened with a warrantless search. The proposed citation and penalty was issued after Petitioner refused to honor a warrant issued by a judicial official. Said proposal was also never in danger of becoming final and was voluntarily dismissed by OSH. Furthermore, there was no likelihood that

such a proposed citation and penalty would again be issued. These facts do not rise to the level of a constitutional violation under § 1983.

Petitioner was in fact threatened and remains subject to a search pursuant to an administrative inspection warrant issued by a neutral judicial official under G.S. 15-27.2(c)(1). The warrant which petitioner refused to honor was found by the Court of Appeals in its first opinion to be insufficient and improperly granted by the magistrate. Obviously, however, neither the Commissioner of Labor nor OSH violated Petitioner's Fourth Amendment rights by seeking a warrant from a neutral judicial offical. Absent any indication of bad faith in seeking the warrant from the magistrate, the attempt to enter and inspect Petitioner's place of business pursuant to a warrant later declared invalid does not give rise to a claim for relief under § 1983 against the Commissioner of Labor.

CONCLUSION

Using the Petitioner's style of argument, it can fairly be said that the second opinion by the Court of Appeals is not a holding that a place of business must actually be entered and inspected before there can be a deprivation of constitutional rights. Nor did the Court hold that a proposed penalty which is not dismissed and has some likelihood of becoming final cannot impinge on or threaten a business's constitutional rights. Furthermore, it does not follow from the second opinion of the Court of Appeals that an imminent threat to violate Fourth Amendment rights will not suffice to presnet a claim for relief under § 1983 in the State courts. However, in a State court, as in a federal court, threats asserted by a claimant must be more than imaginary or speculative or chimerical. The judgments in this cause are very clearly bottomed on the particular facts of this case. Moreover, it is possible that the State apellate court acting within its general supervisory powers over its general courts of justice, may be more willing to expand its jurisdiction to determine the constitutionality of a State statute under the Uniform Declaratory Judgment Act than it is to find jurisdiction for a

claim asserting liability or unlawfulness pursuant to § 1983. This possibility does not make the State courts less accessible for enforcement of federal rights, but also does not make the State courts more accessible for federal claims with a lower threshold for jurisdiction. The Courts of North Carolina are fully available to litigants who wish to pursue claims for relief pursuant to § 1983. The judgments of the North Carolina appellate courts in this cause do not impede such access. For these reasons, writ of certiorari should not issue to the Supreme Court of North Carolina to review the judgments in this case of action.

This the 14th day of November, 1981.

Respectfully submitted,

RUFUS L. EDMISTEN

Attorney General

Tiare B. Smiley
Assistant Attorney General
North Carolina Dept. of Justice

COUNSEL FOR RESPONDENT
111 E. North Street
Raleigh, North Carolina 27601
Telephone: (919) 733-4895

APPENDIX
GENERAL STATUTES OF NORTH CAROLINA

ARTICLE 4A.

Administrative Search and Inspection Warrants.

§ 15-27.2 Warrants to conduct inspections authorized by law. —

(a) Notwithstanding the provisions of Article 4 of this Chapter, any official or employee of the State or of a unit of county or local government of North Carolina may, under the conditions specified in this section, obtain a warrant authorizing him to conduct a search or inspection of property if such a search or inspection is one that is elsewhere authorized by law, either with or without the consent of the person whose privacy would be thereby invaded, and is one for which such a warrant is constitutionally required.

(b) The warrant may be issued by any magistrate of the general court of justice, judge, clerk, or assistant or deputy clerk of any court of record whose territorial jurisdiction encompasses the property to be inspected.

(c) The issuing officer shall issue the warrant when he is satisfied the following conditions are met:

(1) The one seeking the warrant must establish under oath or affirmation that the property to be searched or inspected is to be searched or inspected as part of a legally authorized program of inspection which naturally includes that property, or that there is probable cause for believing that there is a condition, object, activity or circumstance which legally justifies such a search or inspection of that property;

(2) An affidavit indicating the basis for the establishment of one of the grounds described in (1) above must be signed under oath or affirmation by the affiant;

(3) The issuing official must examine the affiant under oath or affirmation to verify the accuracy of the matters indicated by the statement in the affidavit;

(d) The warrant shall be validly issued only if it meets the following requirements:

(1) It must be signed by the issuing official and must bear the date and hour of its issuance above his signature

with a notation that the warrant is valid for only 24 hours following its issuance;

(2) It must describe, either directly or by reference to the affidavit, the property where the search or inspection is to occur and be accurate enough in description so that the executor of the warrant and the owner or the possessor of the property can reasonably determine from it what person or property the warrant authorizes an inspection of;

(3) It must indicate the conditions, objects, activities or circumstances which the inspection is intended to check or reveal;

(4) It must be attached to the affidavit required to be made in order to obtain the warrant.

(e) Any warrant issued under this section for a search or inspection shall be valid for only 24 hours after its issuance, must be personally served upon the owner or possessor of the property between the hours of 8:00 A.M. and 8:00 P.M. and must be returned within 48 hours. If the owner or possessor of the property is not present on the property at the time of the search or inspection and reasonable efforts to locate the owner or possessor have been made and have failed, the warrant or a copy thereof may be affixed to the property and shall have the same effect as if served personally upon the owner or possessor.

(f) No facts discovered or evidence obtained in a search or inspection conducted under authority of a warrant issued under this section shall be competent as evidence in any civil, criminal or administrative action, nor considered in imposing any civil, criminal, or administrative sanction against any person, nor as a basis for further seeking to obtain any warrant, if the warrant is invalid or if what is discovered or obtained is not a condition, object, activity or circumstance which it was the legal purpose of the search or inspection to discover; but this shall not prevent any such facts or evidence to be so used when the warrant issued is not constitutionally required in those circumstances.

(g) The warrants authorized under this section shall not be regarded as search warrants for the purposes of application

of Article 4 of Chapter 15 of the General Statutes of North Carolina. (1967, c. 1260.)

§ **95-136. Inspections.** — (a) In order to carry out the purposes of this Article, the Commissioner or Director, or their duly authorized agents, upon presenting appropriate credentials to the owner, operator, or agent in charge, are authorized:

(1) To enter without delay, and at any reasonable time, any factory, plant, establishment, construction site, or other area, work place or environment where work is being performed by an employee of an employer; and

(2) To inspect and investigate during regular working hours, and at other reasonable times, and within reasonable limits, and in a reasonable manner, any such place of employment and all pertinent conditions, processes, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

§95-137. Issuance of citations.—(a) If,upon, inspection or investigation, the Director or his authorized representative has reasonable grounds to believe that an employer has not fulfilled his duties as prescribed in this Article, or has violated any standard, regulation, rule or order promulgated under this Article, he shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provisions of the act, standards, rules and regulations, or orders alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The Director may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimus violations which have no direct or immediate relationship to safety or health, and violations of State agencies or political subdivisions thereof. Each citation or notice in lieu of citation issued under this

section, or a copy or copies thereof, shall be prominently posted, as prescribed in regulations issued by the Director, at or near such place a violation referred to in the citation occurred.

(b) Procedure for Enforcement. — (1) If, after an inspection or investigation, the Director issues a citation under any provisions of this Article, he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of any penalty, if any, he has recommended to the Commissioner to be proposed under the provisions of this Article and that the employer has 15 working days within which to notify the Director that he wishes to contest the citation or proposed assessment of penalty. If, within 15 working days from the receipt of the notice issued by the Director, the employer fails to notify the Director that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under the provisions of this Article within such time, the citation and the assessment as proposed to the Commissioner shall be deemed final and not subject to review by any court.

(2) If the Director has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction (which period shall not begin to run until the entry of a final order by the Board in case of any review proceedings under this Article initiated by the employer in good faith and not solely for a delay or avoidance of penalties), the Director shall notify the employer by certified mail of such failure and of the penalty proposed to be assessed under this Article by reason of such failure and that the employer has 15 working days within which to notify the Director that he wishes to contest the Director's notification of the proposed assessment of penalty. If, within 15 working days from the receipt of notification issued by the Director, an employer fails to notify the Director that he intends to

contest the notification or proposed recommendation of penalty, the notification and the proposed assessment made by the Director shall be final and not subject to review by any court.

(3) No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

(4) If an employer notifies the Director that he intends to contest a citation issued under the provisions of this Article or notification issued under the provisions of this Article, or if, within 15 working days of the receipt of a citation under this Article, any employee or his representative files a notice with the Director alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Director shall immediately advise the Board of such notification, and the Board shall afford an opportunity for a hearing. The Board shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Director's citation or the proposed penalty fixed by the Commissioner, or directing other appropriate relief, and such order shall become final 30 days after its issuance. Upon showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that an abatement has not been completed because of factors beyond his reasonable control, the Director, after an opportunity for a hearing as provided in this Article, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the chairman of the Board shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this section. (1973, c. 295, s. 12.)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has this day served three copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of North Carolina upon the persons indicated below by depositing a copy of same in the United States mail, first class postage prepaid, addressed to the following:

Hugh Joseph Beard, Jr.
Counsel for Petitioner
2141 P Street, N.W. Apt. 602
Washington, D.C. 20037
Telephone: (202) 466-2528

Thomas J. Ashcraft
Of Counsel for Petitioner
Horack, Talley, Pharr & Lowndes, P.A.
1250 City National Center
Charlotte, N.C. 28202
Telephone: (704) 377-2500

This the 14th day of November, 1981

RUFUS L. EDMISTEN
Attorney General

Tiare B. Smiley
Assistant Attorney General
North Carolina Department of Justice
111 E. North Street
Raleigh, North Carolina 27601
(919) 733-4895